

Department of Justice
Washington, D.C. 20530

775651/8
Per
Leg. Affairs

February 15, 1978

STAT

[redacted]
Office of Legislative Counsel
Central Intelligence Agency
Washington, D. C. 20505

STAT

Dear [redacted]

Pursuant to our telephone conversation earlier this month, I enclose copies of proposed amendments to S. 1845, limiting use of polygraphs in employment testing.

Pages 1 and 2 are typed to indicate the changes in the Justice Department's original draft amendments that were suggested in a letter of December 19 from [redacted] to James McIntyre. New material is underlined and deleted words are crossed out. With one exception, I believe that we discussed all of the changes, which I trust will satisfy the CIA's concerns.

STAT

The exception is the new matter at the end of subsection (B). You mentioned that CIA polygraphing of non-competitive service employees is done in accordance with regulations approved by the Director. It seemed to me, upon reflection, that if this is the policy, it might be politically valuable to write it into the statute and get credit for doing something to protect individual rights. Feel free to redraft the addition if it raises APA problems or other issues.

Page 3 is another possible version of subsection (B). We attempted to draft it to avoid the complex language needed to describe accurately and completely the employment, etc., relationships in the first part of the page 2 draft. Instead, it refers only to functions that persons perform. If you think it necessary to mention the CIA specifically, we could insert, after the word "who" on the first line the following:



", for or on behalf of the Central Intelligence Agency, the National Security Agency, or any other agency of the United States,"

I think I prefer the page 3 version (with or without reference to agency regulations), but let us discuss it further.

Page 4 is a redraft of section 247(b)(2) that refers to the exception for government contractors in (b)(1)(B). It also changes the form from a criminal prohibition to a civil prohibition, in line with our earlier recommendation to that effect. I would think that the whole statute would then probably go somewhere in Title 42, United States Code, rather than in Title 18, but that can be dealt with by the Senate Committee.

Please call me so that we can discuss any problems you have with any of this.

Sincerely,



David A. Barrett
Special Counsel - Legislation

Enclosures

101

Change section 247(b)(1) to read:

(b)(1) No officer or employee of the United States nor any person acting for or on behalf of the United States shall require or request any officer or employee of the United States, or any individual seeking employment as an officer or employee of the United States, to take any polygraph test in connection with his or her services or duties as an officer or employee, or in connection with such individual's application or consideration for employment, except that such polygraph tests may be administered -- ~~in accordance with regulations of the Civil Service Commission:~~

(A) in the course of an investigation of an alleged criminal act committed by an officer or employee of the United States, provided that--

(i) there is probable cause to believe that such officer or employee has committed a criminal act;

(ii) such officer or employee freely and voluntarily consents to the polygraph test after being informed of the nature of the allegations against him, his privilege against self-incrimination, and his right to counsel; and

(iii) any such employee's refusal to submit to a polygraph test may not be used in any manner against him, either in the criminal investigation or in future personnel action, and no record of the polygraph test or the refusal to submit to it may be maintained outside law enforcement files; and

(B) to officers or employees, or individuals seeking employment as officers or employees, of, persons assigned or detailed to, or affiliated with, the Central Intelligence Agency, the National Security Agency, or any other agency of the United States, if such persons actually perform or would perform national security, intelligence or counter-intelligence functions or engage in support or security duties directly related to such functions, and to any employees of contractors of such agencies who perform such functions. or duties, provided that such tests may be administered only in accordance with regulations approved by the head of the agency or department, or by the Civil Service Commission in the case of employees in the competitive service.

(B) to individuals who actually perform or would perform national security, intelligence or counterintelligence functions or engage in support or security duties related to such functions, and to any employees of government contractors who perform such functions or duties, provided that such tests may be administered only in accordance with regulations approved by the head of the agency or department, or by the Civil Service Commission in the case of employees in the competitive service.

4

Change section 247(b)(2) to read:

(2) Except as permitted by subsection (b)(1)(B) of this section, no person engaged in any activity in or affecting interstate commerce, and no individual acting under the authority of such person, shall--

(A) require or request any individual seeking employment in connection with such business or activity to take any polygraph test in connection with his application or consideration for employment; or shall accept or use the results of any polygraph test in connection with such application; or shall

(B) require or request any individual employed by such person to take any polygraph test in connection with his or her services or duties as an employee; or shall accept or use the results of any polygraph test, unless the employee freely and expressly requests to take such a test and the request is not a product of coercion or intimidation by the employer.